Public Prosecutor v Nik Ahmad Aman bin Nik Mansor

HIGH COURT (SHAH ALAM) — CRIMINAL TRIAL NO 47–7 OF 1999
KANG HWEE GEE J
29 APRIL 2002

Criminal Law — *Trafficking in dangerous drugs — Cannabis — Drugs found in boot of car driven by accused — Whether accused had possession of drugs or was in custody and control of drugs found in the boot — Whether drugs found concealed in any compartment, specially, constructed for the purpose — Whether s 37(h) of Dangerous Drugs Act 1952 applicable — Dangerous Drugs Act 1952 s 39B*

Criminal Law — *Trafficking in dangerous drugs — Cannabis — Drugs found in boot of car driven by accused — Whether trafficking could be proved by mere possession alone — Whether necessary to prove that accused transferred or had intended to transfer possession or custody and control of drugs to another party — Dangerous Drugs Act 1952 s 39B*

The accused was charged under s 39B of the Dangerous Drugs Act 1952 with the offence of trafficking in 55,665.1g of cannabis. On the day of the accused's arrest, a police party had set themselves up at Taman Sri Gombak to conduct an operation to apprehend three drug traffickers who would be travelling in two cars, a Ford Lynx and a Honda Accord. The Ford Lynx stopped behind the Honda Accord, which was driven by the accused. The occupants of the Ford Lynx fired shots in the direction of policemen as the latter were approaching the car. The police returned fire and killed the occupants of the Ford Lynx. During the shooting, the accused sped off in his car and was chased by another team of policemen. Upon finding that his path was blocked, the accused ran out of his car. The accused was finally arrested and a set of car keys was found on him. The police opened the boot of the car with one of the car keys. Three plastic bundles were found in the boot and each bundle was found to contain slabs of plant material suspected to be cannabis. The slabs of plant material were confirmed to be cannabis. The Honda Accord was a stolen car.

Held, acquitting and discharging the accused:

(1) To prove that the accused was transporting, carrying, sending, delivering or distributing the cannabis so as to constitute trafficking under s 2 of the Dangerous Drugs Act 1952, the prosecution had to first prove that the accused was in possession of the drugs or that he was at least in custody and control of the drug found in the boot of the car, for unless the accused was in possession or in custody or control of the drugs, he would not be in a position to traffic in the drugs (see p 647A–B).

(2) In order for possession to be made out, there must be the presence of a physical element and a mental element. Hence, the accused must not only be so situated that he could deal with the thing as if it belonged to him but it must be shown that he had the

intention of dealing with it as if it belonged to him should he see any occasion to do so. In practice, to secure a conviction for trafficking, the prosecution had to prove that the accused was in actual physical possession of the drug, as for instance, it was recovered from his person; otherwise it would be necessary to prove that he was so proximate to it that its placement there could admit of no other conclusion other than that he was the possessor (see p 647E–G).

(3) The fact that the accused knew or ought to have known that the drugs were in the car ought not to affect the finding that he was not in custody or control of the drugs, a fortiori, where the prosecution was required to prove possession (see p 649H); *Deputy Public Prosecutor v Brooks* [1974] 2 All ER 840 distinguished.

(4) Despite the accused's dramatic attempted escape, the court was constrained not to draw any inference of his knowledge of the drugs, for that conduct was equally consistent with his immediate reaction to the preceding shooting incident between the police and the occupants of the Ford Lynx car. The fact that the accused sped off during the shooting was sufficient to neutralize the adverse inference that may be invoked against him by his conduct (see p 650B–C).

(5) Even assuming that the prosecution had successfully made out a case of possession, trafficking could not be proved by mere possession alone. To prove that the accused was trafficking, it would still be necessary to prove that the accused transferred or had intended to transfer possession, or at least, custody and control of the drug to another party. Had it been the intention of the legislature to make the mere acts of transporting, carrying, sending, delivering, procuring, supplying or distributing the drugs an offence punishable by death, it would have said so directly in clear language and avoid altogether the word 'trafficking' (see pp 650C–D, 652C–D).

(6) Therefore, the mere act of transporting, carrying, sending, delivering, procuring, supplying or distributing by the accused in the instant case, acts which he could conceivably be perceived to do as the driver of the car under the circumstances, were not enough to constitute an act of trafficking in the absence of any evidence that the drugs were to be transferred or conveyed to another party. The fact that the Ford Lynx had parked behind the Honda Accord for that brief moment, without more, was insufficient to convey any such intention on the part of the accused (see p 652D–E).

[Bahasa Malaysia summary

Tertuduh telah dituduh di bawah s 39B Akta Dadah Berbahaya 1952 dengan kesalahan mengedar 55,665.1g ganja. Pada hari penangkapan

tertuduh, satu pasukan polis telah membuat persediaan di Taman Sri Gombak untuk menjalankan satu operasi untuk memberkas tiga orang pengedar dadah yang akan bergerak dalam dua buah kereta, sebuah kereta Ford Lynx dan sebuah lagi kereta Honda Accord. Kereta Ford Lynx telah berhenti di belakang kereta Honda Accord, yang telah dipandu oleh tertuduh. Pemilik-pemilik kereta Ford Lynx tersebut telah melepaskan tembakan ke arah anggota polis tersebut ketika ia sedang menghampiri kereta tersebut. Anggota polis telah membalas tembakan dan membunuh pemilik-pemilik kereta Ford Lynx. Ketika peristiwa tembak-menembak itu, tertuduh telah memecut dalam kereta beliau dan telah dikejar oleh satu pasukan polis yang lain. Setelah mendapati bahawa laluannya telah dihalang, tertuduh telah berlari keluar daripada keretanya. Tertuduh telah akhirnya ditangkap dan satu set kunci kereta telah didapati berada padanya. Polis telah membuka but kereta tersebut dengan salah satu kunci-kunci tersebut. Tiga ikatan plastik telah dijumpa dalam but kereta dan setiap satu ikatan didapati mengandungi kepingan bahan daun yang disyaki sebagai ganja. Kepingan bahan daun itu telah disahkan sebagai ganja. Ketera Honda Accord tersebut adalah kereta curi.

Diputuskan, membebas dan melepaskan tertuduh:

(1) Untuk membuktikan bahawa tertuduh telah mengangkut, membawa, menghantar, menghantar serah atau mengedarkan ganja hingga membentuk perbuatan mengedar di bawah s 2 Akta Dadah Berbahaya 1952, pihak pendakwaan haruslah pertamanya membuktikan bahawa tertuduh mempunyai dalam milikannya dadah tersebut atau bahawa beliau telah sekurang-kurangnya mempunyai jagaan dan kawalan dadah tersebut yang didapati dalam but kereta tersebut, kerana kecuali tertuduh mempunyai dadah tersebut dalam milikan atau jagaan atau kawalannya, beliau tidak akan berada dalam kedudukan untuk mengedar dadah (lihat ms 647A–B).

(2) Demi untuk membuktikan pemilikan, tentunya harus terdapat unsur fizikal dan unsur mental. Oleh itu, tertuduh bukan sahaja mesti berada dalam keadaan yang membolehkan beliau berurusan dengan benda tersebut seolah-olah ia kepunyaan beliau tetapi ia haruslah juga ditunjukkan bahawa beliau mempunyai niat untuk berurusan dengan benda itu seolah-olah ia merupakan kepunyaannya sekiranya beliau melihat adanya sebarang keadaan untuk beliau berbuat sedemikian. Menurut amalan, untuk mendapatkan suatu sabitan untuk pengedaran, pihak pendakwaan haruslah membuktikan bahawa tertuduh sebenarnya mempunyai dadah tersebut dalam milikannya secara fizikal, seperti mana keadaannya, dadah tersebut telah diperolehi daripada dirinya sendiri; jika tidak, ia adalah perlu untuk membuktikan bahawa beliau berhampirannya hinggakan peletakannya di situ boleh mendatangkan kesimpulan yang tidak

lain daripada bahawa beliau adalah sesungguhnya pemiliknya (lihat ms 647E–G). A

(3) Fakta bahawa tertuduh mengetahui atau sepatutnya telah mengetahui bahawa dadah itu berada dalam kereta tersebut tidak seharusnya menjejaskan keputusan bahawa beliau tidak mempunyai jagaan atau kawalan dadah tersebut, iaitu, di mana pihak pendakwaan dikehendaki untuk membuktikan pemilikan (lihat ms 649H); *Deputy Public Prosecutor v Brooks* [1974] 2 All ER 840 dibeza. B

(4) Meskipun percubaan dramatik oleh tertuduh untuk melarikan diri, mahkamah telah ditegah supaya tidak membuat sebarang inferens mengenai pengetahuan beliau mengenai dadah tersebut, kerana perlakuan tersebut konsisten dengan reaksi beliau kepada peristiwa menembak yang lebih awal antara polis dan penumpang kereta Ford Lynx. Hakikat bahawa tertuduh telah memecut ketika kejadian tembak-menembak tersebut memadai untuk meneutralkan inferens bertentangan yang mungkin boleh digunakan terhadap beliau oleh perlakuan beliau (lihat ms 650B–C). C D

(5) Meskipun menjangkakan bahawa pihak pendakwaan telah dengan jayanya membuat satu kes pemilikan, pengedaran tidak boleh dibuktikan oleh pemilikan sahaja. Untuk membuktikan bahawa tertuduh mengedar, masih perlu untuk membuktikan bahawa tertuduh telah memindahkan atau telah berniat untuk memindahkan milikan, atau sekurang-kurangnya jagaan dan kawalan dadah tersebut kepada pihak yang lain. Sekiranya ia merupakan niat perundangan untuk menjadikan perbuatan-perbuatan mengangkut, membawa, menghantar-serah, memperolehi, membekalkan atau mengedar dadah tersebut suatu kesalahan yang boleh dihukum mati, ia tentu sekali akan menyatakan sedemikian dengan bahasa yang jelas dan mengelakkan sama sekali perkataan 'mengedar' (lihat ms 650C–D, 652C–D). E F G

(6) Oleh itu, tindakan mengangkut, membawa, menghantar, menghantar serah, memperolehi, membekalkan atau mengedarkan oleh tertuduh dalam kes ini, perbuatan-perbuatan yang boleh dikatakan telah beliau lakukan sebagai pemandu kereta tersebut dalam keadaan itu, tidak memadai untuk membentuk satu perbuatan mengedar dalam ketiadaan sebarang keterangan bahawa dadah tersebut hendaklah dipindahkan atau disampaikan kepada satu pihak lain. Fakta bahawa kereta Ford Lynx tersebut telah berhenti sejenak di belakang kereta Honda Accord, tanpa lebih daripada itu, tidak memadai untuk menerangkan sebarang niat sedemikian pada pihak tertuduh (lihat ms 652D–E).] H I

A **Notes**

For cases on trafficking, see 4 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 126–303.

Cases referred to

B *Abdullah Zawawi bin Yusoff v PP* [1993] 3 MLJ 1 (refd)
Chan Pean Leon v PP [1956] MLJ 237 (refd)
Chang Kim Siong v PP [1968] 1 MLJ 36 (refd)
Choo Yoke Choy v PP [1992] 2 MLJ 632 (refd)
Chow Kok Keong v PP [1998] 2 MLJ 337 (refd)
C *DPP v Brooks* [1974] 2 All ER 840 (distd)
Jonaidi bin Mansor v PP [2002] 2 MLJ 111 (refd)
Lee Chee Meng v PP [1992] 1 MLJ 322 (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273 (refd)
Ong Ah Chuan v PP [1981] 1 MLJ 64 (refd)
PP v Chia Leong Foo [2000] 6 MLJ 705 (refd)
D *PP v Hairul Din bin Zainal Abidin* [2001] 6 MLJ 146 (refd)
PP v Kau Joo Huat [1988] 2 MLJ 91 (refd)
PP v Lin Lian Chen [1992] 2 MLJ 561 (refd)
PP v Mansor bin Mohd Rashid & Anor [1996] 3 MLJ 560 (refd)
Teh Geok Hock v PP [1989] 3 MLJ 162 (refd)

E

Legislation referred to

Criminal Procedure Code s 180
Dangerous Drugs Act 1952 ss 2, 37(d), 37(da)(vi), 39B
Misuse of Drugs Act (Singapore) 1973 s 2

F *Hanafiah Zakaria* (Deputy Public Prosecutor) for the prosecution.
Rusli Zain (*Rusli Zain & Associates*) for the accused.

Kang Hwee Gee J: The accused was charged under s 39B of the Dangerous Drugs Act 1952 ('the Act') with the offence of trafficking in 55,665.1g of cannabis, a dangerous drug under the First Sch of the Act.
G The offence attracts the mandatory death penalty on conviction.

The evidence constituting the case for the prosecution was narrated to the court by Inspector Fisol and Inspector Azmi, the officer who later apprehended the accused. Their evidence may be summarized as follows — on 12 October 1997, at about 7.45pm, a police party had set themselves up
H at Taman Sri Gombak to conduct an operation to apprehend three drug traffickers who would be travelling in two cars, a Ford Lynx and a Honda Accord. The party had earlier been briefed by Inspector Fisol and was organized into teams, each assigned a role to play. They communicated by radio.

They took their respective positions at the area around the Telecom
I Exchange. Inspector Fisol set himself up at a restaurant along Jalan Makmur, at a point where he could observe the movement of cars on the road.

At about 8.25pm, Inspector Fisol saw a Ford Lynx, car registration number PCY 9595 being driven along Jalan Makmur. The car stopped in front of the Telecom Exchange for about three minutes before it proceeded to turn right into Jalan SG 2/8. Inspector Fisol followed the car. A

The Ford Lynx then stopped behind another stationary car at a point along Jalan SG 2/8. The accused was the driver of the car, a Honda Accord bearing registration number JCE 6842. B

When the Inspector was about two to three metres away from the Ford Lynx, the accused sped away from the Ford Lynx.

The occupants of the Ford Lynx suddenly fired shots in the direction of Inspector Fisol and his team causing them to return fire. The exchange of shots resulted in the death of both the occupants of the Ford Lynx. C

At about the same time, another team led by Inspector Azmi riding a motorcycle approached the accused from the opposite direction along the same road. He was able to notice what had transpired. He turned around and chased after the accused. D

The accused turned left into a lane off Jalan SG 2/7. Upon finding his egress blocked, he got out of his car and took to his heels leaving the car door ajar. He ran into a linked house nearby. He entered a room and from the ceiling climbed onto the roof from where he was eventually apprehended by Inspector Azmi with the assistance of two other police personnel. A body search was conducted on him at the place of arrest itself. E Two car keys were recovered from the right side pocket of his trousers along with some personal items found on him.

The accused was then taken down from the roof and brought to his car. Using one of the car keys recovered from him, Inspector Azmi opened the boot of the car. In the boot, he recovered three plastic bundles each tied F with a plastic string. In each of these bundles, were slabs of plant materials suspected to be cannabis. Having counted the number of slabs contained in each bundle, he put the slabs back into the boot. No other incriminating exhibits were found in the car.

The accused was handed over to the investigation officer at the Selayang Police Station, together with the car and drugs. G

The slabs of plant materials found in the car were later confirmed by the government chemist upon due analysis to be cannabis, a dangerous drug listed under the First Sch of Act, weighing 55,665.1g in all.

The car had belonged to one Azizan bin Azmi from Rengam, Johor, who claimed to have lost it sometime in August 1996 to a prospective buyer H called Ho who failed to return the car after a test drive.

Section 2 of the Act defines trafficking as follows:

> Unless the context otherwise requires, trafficking includes the doing of any of the following acts, that is to say, manufacturing, importing exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, I transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drugs ...

Given that in the instant case, the drug was recovered from the car driven by the accused, the act that he could conceivably be accused of doing in the context of s 2 under the circumstances would be either transporting, carrying, sending, delivering or distributing the drug.

It follows as a matter of common sense that to prove that the accused in the instant case was transporting, carrying, sending, delivering or distributing the cannabis so as to constitute trafficking under s 2 of the Act, it would be necessary for the prosecution, first and foremost, to prove that the accused was in possession of the drug or that he was at least in custody and control of the drug found in the boot of the car — for unless he was in possession or in custody and control of it, he would not be in a position to traffic in such drug, see *PP v Chia Leong Foo* [2000] 6 MLJ 705 at pp 717–718.

Possession, as Lee Hun Hoe CJ (Borneo) delivering the judgment of the Supreme Court in *PP v Kau Joo Huat* [1988] 2 MLJ 91 said, can be the 'vaguest of all vague terms'. Thompson J (as he then was) defined it in *Chan Pean Leon v PP* [1956] MLJ 237 at p 239, in the following words:

> 'Possession' itself as regards the criminal law is described as follows in *Stephen's Digest* (9th Ed, p 304):
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> > 'A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner, to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.'
>
> To put it otherwise, there is a physical element and a mental element which must both be present before possession is made out. The accused must not only be so situated that he can deal with the thing as if it belonged to him, for example, have it in his pocket or have it lying in front of him on a table. It must also be shown that he had the intention of dealing with it as if it belonged to him, should he see any occasion to do so, in other words, that he had some *animus possidendi*. Intention is a matter of fact, which in the nature of things, cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case.

In practice, to secure a conviction, the prosecution needs to prove that the accused was in actual physical possession of the drug, as for instance if it was recovered from his person, say from his pocket; otherwise it would be necessary to prove that he was so proximate to it that its placement there could admit of no other conclusion other than that he was the possessor.

Thus in *Choo Yoke Choy v PP* [1992] 2 MLJ 632 where some heroin was found in a room occupied by the accused and his wife, and in the kitchen of the house, the Supreme Court found that although the accused may have knowledge of the drugs, he did not have possession of them as his wife was also occupying the room at the material time and the kitchen was accessible to other occupants in the house.

The same concept of 'exclusivity' was applied in *Lee Chee Meng v PP* [1992] 1 MLJ 322 by the Supreme Court with respect to the recovery of some 61 packets of mixed heroin and monoacetyl-morphine in a room of a shophouse in which the accused was occupying. It was held, inter alia, that

possession of the drug in that room had not been proved against the accused as he did not have the exclusive use of the room, it being accessible to his friends.

In yet another Supreme Court case, *PP v Lin Lian Chen* [1992] 2 MLJ 561, where a large amount of heroine weighing 578.94g in all was recovered from a Honda car, it was ruled that custody and control of the drugs had not been proved despite the fact that they were found on the rear left foot-well, in the glove compartment and in six cigarettes in a packet on the dashboard — all within the close proximity of the driver who was alone in the car at the time. This was what Edgar Joseph Jr SCJ (speaking for the Supreme Court) said at p 567 of the judgment:

> It is trite law that where the prosecution is relying on circumstantial evidence, the onus upon it is a very heavy one and that evidence must point irresistibly to the guilt of the accused. If there are gaps in it, then that will not be sufficient (per Pike CJ in *Chang Kim Siong v PP* [1968] 1 MLJ 36).
>
> Turning to the evidence, although it is true that the respondent was the sole occupant of the Honda, being the driver and therefore in charge of it, the fact remains, that he was not its owner and, there was no evidence from which it could be reasonably inferred that he must have been in custody or control of the seven newspaper packages or the cigarette packet which contained the offending exhibits.
>
> In this context, mere knowledge of the presence of the seven newspaper packages or the cigarette packet in the Honda, without more, would not be sufficient to constitute custody or control thereof though it would constitute an essential step in that direction. But, the position here was that there was not even proof of such knowledge, much less proof of knowledge of the presence of the offending exhibits in the seven newspaper packages or the cigarette packet.

In contrast, in the more recent case of *Pendakwa Raya v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560, the Federal Court was able to find that both the accused had been in direct possession of the quantity of cannabis which was recovered from a room of a house in which both of them had been occupying. In that case, evidence was led by the prosecution that the accused had earlier sold 1kg of the drug to the police agent provocatuer and had just prior to their arrest in the house intended to sell to the same agent provocatuer another 2kg.

Similarly, in the very recent case of *Jonaidi bin Mansor v PP* [2002] 2 MLJ 111 at p 114, the Court of Appeal found that custody and control leading to the presumption of possession had been proved 'to the hilt', where some 186g of cannabis were recovered from the boot of the accused's car and where evidence had been led that the accused had earlier removed them from a room which he was the occupier.

On my part, I would accept the submission of counsel for the accused that *Lin Lian Chen* would be the yardstick to use to determine whether possession has been prima facie made out in the present case.

As in *Lin Lian Chen*, the drugs were recovered from a car in which the accused was the driver but not the owner, although the circumstances that

led to the recovery of the drugs and the arrest of the accused were different. Whereas Lin Lian Chen had submitted to arrest, the accused in the instant case had sped away in the car with the drugs upon the arrival of the police. He had to be pursued on foot when he abandoned the car and the police was only able to apprehend him from the roof of a house from which he had entered in attempting to escape.

The incident therefore provides a viable opening for the deputy public prosecutor ('DPP') to submit that the conduct of the accused constitutes evidence of the 'most potent kind' of his knowledge of the drug and generally of his guilt. The learned DPP relied on the now oft-cited case of *DPP v Brooks* [1974] 2 All ER 840, a decision of the Privy Council on appeal from the Court of Appeal of Jamaica. In that case, a large consignment of ganja was being carried in a van. The accused and the other occupants had run off upon seeing uniformed police officers approaching the van. The accused was caught after a short chase. The issue that the judicial committee was required to determine was whether an inference could be drawn that the accused had the knowledge that the load in the van was ganja. Lord Diplock, speaking for the Judicial Committee, ruled at p 867:

> The only remaining issue was whether the inference should be drawn that the respondent knew that his load consisted of ganja. Upon all the evidence, and in particular the fact that he and other occupants of the van attempted to run away as soon as they saw the uniformed police approaching, the magistrate was, in their Lordship's view, fully entitled to draw the inference that the defendant knew what he was carrying in the van.

The submission of the learned DPP is untenable for two reasons:

Firstly, the ruling of the Judicial Committee in the *Brooks* was only in respect of the mental element of knowledge. In *Lin Lian Chen* the fact that the accused had knowledge of the drug was not in issue. *Lin Lian Chen* was decided purely on the physical element of custody and control — that is to say, whether in the circumstances prevailing, the driver of the car was in custody or control of the drug, notwithstanding that he might have knowledge of its existence in the car.

As Anuar J (then co-opted as a member of the panel) said in the Supreme Court case of *Choo Yoke Choy v PP* [1992] 2 MLJ 632 at p 640:

> In order to found a conviction, the prosecution must establish not only that the appellant had knowledge of the existence of the drugs, but that he also had exclusive custody and control over them.

In the instant case, the fact that the accused knew or ought to have known that the drug was in the car ought not to have affected the finding much like in *Lin Lian Chen*, that he was not in custody or control of the drug, a fortiori where the prosecution is required to prove possession.

Secondly, *Brooks* was subjected to some critical appreciation by the Supreme Court in *Abdullah Zawawi bin Yusoff v PP* [1993] 3 MLJ 1 at p 9, wherein Edgar Joseph Jr SCJ, delivering the judgment of the court, found that while the act of the appellant in running away upon the discovery of

drugs by the police at the scene may be consistent with his 'conduct of having known of the presence of the drugs in the box before their discovery, indicating thereby a sense of guilt, it may also be equally consistent with the appellant being in a state of pure panic, bearing in mind that it was only after Inspector Mat Yusoff announced the discovery of the drugs that the appellant took to his heels. A

As dramatic as the attempted escape of the accused may appear in the instant case, I am constrained not to draw any inference of his knowledge of the drugs — for that conduct was equally consistent with his immediate reaction to the preceding shooting incident with the occupants of the Ford Lynx which resulted in their deaths. Initially, it was unclear exactly at what point of time did the accused speed away — whether before or after the shots were fired. However, on being cross examined, Inspector Fisol admitted that it was during the shooting — an action sufficient in my view to neutralize the adverse inference that may be invoked against him by his conduct. B C

But even assuming that the prosecution has successfully made out a case of possession, trafficking in the context of the instant case cannot be proved by mere passive possession alone. D

A cursory reading of the definition of 'traffickingí in s 2 of the Act tends to convey the impression that trafficking may be proved only by adducing evidence that the accused had done any of the acts mentioned in the section, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing the drug. But as Augustine Paul J said in *PP v Hairul Din bin Zainal Abidin* [2001] 6 MLJ 146, 'the definition of 'trafficking' contemplates acts that go beyond mere or passive possession of dangerous drugs. E

As indicated in the judgment, that proposition was first mooted in the judgment of the Privy Council on appeal from the Court of Appeal Singapore in *Ong Ah Chuan v PP* [1981] 1 MLJ 64, wherein the Judicial Committee had to decide on the meaning of 'trafficking' under the Misuse of Drugs Act 1973 of Singapore. It was even more emphatically defined under s 2 to mean 'sell, give, administer, transport, send, deliver or distribute'. F G

Speaking for the Judicial Committee, this was what Lord Diplock said:

> To 'traffic' a controlled drug so as to constitute the offence of trafficking under s 3 involves something more than passive possession or self-administration of the drug; it involves doing or offering to do an overt act of one or other of the kinds specified in para (a) of the definition of 'traffic' and 'trafficking' in s 2. Even apart from any statutory definition, the ordinary meaning of the verb 'to traffic', in the particular context of trafficking in goods of any kind, imports the existence, either in fact or in contemplation, of at least two parties: a supplier and a person to whom the goods are to be supplied. This concept, involving transfer of possession, is reflected in the statutory definition itself. Of the seven verbs used to describe the various kinds of overt acts which constitute trafficking, 'transport' is sandwiched between 'sell, give, administer' which precede it and 'send, deliver or distribute' which follow it. H I

All of these other verbs refer to various ways in which a supplier or distributor, who has drugs in his possession, may transfer possession of them to some other person. 'Transport', although it must involve possession of the drugs by the person who transports them, is the only member of the heptad of verbs that is not inconsistent with the retention of possession of the drugs by him after their transport. It must mean moving the drugs from one place to another; it may mean moving them also to another person, but it need not do so. Whether it bears the wider or the narrower meaning depends upon the context in which the verb appears. In their Lordships' view, the immediate context of the verb 'transport', to which attention has been drawn, attracts the maxim *noscitur a sociis*. This, and the fact that it appears in the definition of the verb to 'traffic', of which the natural meaning in the context of trafficking in goods involves dealings between two parties at least, and that the evident purpose of the Act is to distinguish between dealers in drugs and the unfortunate addicts who are their victims, all combine to make it clear that 'transport' is not used in the sense of mere conveying or carrying or moving from one place to another, but in the sense of doing so to promote the distribution of the drug to another. Supplying or distributing addictive drugs to others is the evil against which s 3 with its draconian penalties is directed.

The decision did not however find favour with the Supreme Court in *Teh Geok Hock v PP* [1989] 3 MLJ 162, where Hashim Yeop Sani CJ, speaking for the panel ruled as follows:

True, the definition in the Act sounds artificial and not according to the ordinary meaning of the word 'trafficking' which is normally understood to mean to trade in, buy or sell, any commodity, albeit often with sinister implication, see also the *Shorter Oxford English Dictionary*. The definition of 'trafficking' in the Act is wide and includes not only buying and selling, but also carrying, concealing and keeping. It is totally different from the definition of the word 'traffic' in the Singapore Misuse of Drugs Act. In the Singapore provision, to 'traffic' in a controlled drug so as to constitute an offence of trafficking, involves something more than passive possession or self-administration of the drug, see *Ong Ah Chuan v PP*.

But *Tee Geok Hock* is no longer good law, having been disapproved by the Federal Court in the more recent judgment of *Chow Kok Keong v PP* [1998] 2 MLJ 337, wherein at p 348, Edgar Joseph Jr SCJ, speaking for the panel said:

The judge, however, appears to have overlooked the later Supreme Court case of *Cohen Lorraine Philis & Anor v PP* [1989] 3 MLJ 289, where the court (per Abdul Hamid LP) held that in a prosecution for trafficking in dangerous drugs, a defence of self-consumption might be *available* eventhough the quantity of drugs involved was in excess of the statutory minimum prescribed under s 37(da) of the Act, but whether it could succeed would depend upon the particular circumstances of each case. And, in the subsequent case of *Ng Chai Kem v PP* [1994] 2 MLJ 210, the Supreme Court followed *Cohen*.

In our view, both *Cohen* and *Ng Chai Kem*, have severely watered down Teh Geok Hock in so far as it implies that passive possession or self-administration can never be a defence to a charge of trafficking under s 39B of our Act. Having considered this point afresh, we preferred the views expressed in *Cohen* and *Ng Chai Kem* to those in *Teh Geok Hock* which we regarded as oversimplistic. (Emphasis added.)

The issue that the Federal Court had to decide in *Chow Kok Keong* was whether possession of large amounts of dangerous drugs for self-consumption could constitute a defence to trafficking. It did not go so far as to decide whether the narrower construction of 'trafficking' encompassing the element of 'dealing between two parties' and 'transfer of possession' (where the context requires in each case) as propounded by Lord Diplock in *Ong Ah Chuan* was acceptable. But by deciding that self-consumption can constitute a good defence to a charge of trafficking, at the very least, one can now be sure that the act of trafficking cannot be equated directly with the acts of transporting, carrying, sending, delivering, procuring, supplying or distributing the drug.

I am persuaded by the reasoning in *Ong Ah Chuan* that to prove that the accused was trafficking in the context of the instant case, it would still be necessary to prove that he transferred, or at least intended to transfer, possession (or at least custody and control) of the drug to another party. Had it been the intention of the legislature to make the mere acts of transporting, carrying, sending, delivering, procuring, supplying or distributing the drug an offence punishable by death, it would have said so directly in clear language avoiding altogether the word 'trafficking'.

I am therefore bound to find that the mere act of transporting, carrying, sending, delivering, procuring, supplying or distributing by the accused in the instant case, (acts which he could conceivably be perceived to do as the driver of the car under the circumstances) would not be enough to constitute an act of trafficking in the absence of any evidence that the drug was to be transferred or conveyed to another party. The fact that the Ford Lynx had been observed to have parked for that very brief moment behind the Honda Accord without more, is in my view insufficient to convey any such intention on the part of the accused.

The large amount of drugs recovered in the instant case may by itself attract the inference of trafficking. But that inference may not be drawn against the accused as he was not in possession of the drug.

It would of course be perfectly open to the prosecution to prove trafficking by calling in aid the presumption of trafficking under s 37(da)(vi) of the Act which provides that:

> In all proceedings under this Act or any regulation made thereunder — any person who is found in possession of 200 grammes or more in weight of cannabis; otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug;

But the prosecution would still be required to prove possession per se and nothing less would suffice. Merely proving that the accused was in 'custody and control' under s 37(d) of the Act to arrive at the presumption that he was in possession of the drug is now impermissible.

The law on this point has now been settled by the Federal Court in *Muhammed bin Hassan v PP* [1998] 2 MLJ 273, per Chong Siew Fai CJ (Sabah & Sarawak) as summarized by headnote 3 of the report:

To come to the presumptions of possession and knowledge under s 37(d) of the Act, one needs only to arrive at a finding of having had 'in custody or under ... control anything whatsoever containing' the drugs whereas to arrive at the presumption of 'trafficking' under s 37(da), a finding of being 'in possession' of the drug is necessary. It would therefore be unduly harsh and oppressive to construe the automatic application of presumption upon presumption. Such a construction ought to be adopted only if, upon the wordings of the two subsections, such an intention of the Parliament is clear, which here is not. Therefore, to constitute 'possession' under s 37(da) of the Act, so as to be capable of forming one of the ingredients thereunder giving rise to the presumption of trafficking, there must be an express affirmative finding, not only a legal presumption, of possession as understood in criminal law, based on evidence. The word 'found' in s 37(d) must bear the same meaning as the word 'found' in s 37(da). Both require evidential materials in attaining proof thereof and are different from the word 'deemed' employed in s 37(d) (see pp 288I, 289A–C and 291G–H).

Moreover, to read the presumption of possession provided in s 37(d) into s 37(da) so as to invoke against an accused a further presumption of trafficking would not only be ascribing to the phrase 'found in possession' in s 37(da) a meaning wider than it ordinarily bears, but would also be against the established principles of construction of penal statutes and unduly harsh and oppressive against the accused. Any ambiguity in s 37(da) should be resolved in favour of the accused by placing the burden of proving possession of the substances involved on the prosecution. The trial judge had therefore erred in law by using the presumption of possession under s 37(d) of the Act to invoke the presumption of trafficking under s 37(da) thereof (see pp 291H–I and 292B, D).

Having considered the evidence and having heard the submissions of the parties, I am convinced that the prosecution has not made out a prima facie case against the accused as required under s 180 of the Criminal Procedure Code (as amended by Act A979).

The accused is acquitted and discharged.

Accused acquitted and discharged.

Reported by Lim Lee Na